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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UMG RECORDINGS, INC., a Delaware corporation; SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership; ARISTA RECORDS LLC, a Delaware limited liability company; ELEKTRA ENTERTAINMENT GROUP INC., a Delaware corporation; CAPITOL RECORDS, INC., a Delaware corporation; and BMG MUSIC, a New York general partnership,

Plaintiff
v.

ELISE TAMAI.

Defendant.

Case No.: 3:07-CV-04835-JCS

Honorable Joseph C. Spero

**NOTICE OF MOTION AND MOTION FOR
DEFAULT JUDGMENT BY THE COURT
AGAINST DEFENDANT ELISE TAMAI**

Date: July 11, 2008
Time: 9:30 a.m.
Place: Courtroom A, 15th Floor

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NOTICE OF MOTION FOR DEFAULT JUDGMENT

TO DEFENDANT:

PLEASE TAKE NOTICE that on July 11, 2008, 9:30 a.m. in Courtroom A, 15th Floor, or as soon thereafter as this matter may be heard by the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California, 94102, Plaintiffs will present their application for default judgment against Defendant Elise Tamai (“Defendant”) pursuant to Federal Rule of Civil Procedure 55(b)(2). The clerk has previously entered the default of Defendant on March 27, 2008.

This Application is brought on the ground that Defendant has not appeared in this action. Plaintiffs seek the following Judgment against Defendant: (1) minimum statutory damages for each of the nine (9) infringements alleged in the First Amended Complaint (“Complaint”) in the amount of \$6,750.00, (2) a permanent injunction in the form sought in the Complaint pursuant to Section 502 of the Copyright Act, and (3) costs in the amount of \$420.00 pursuant to Section 505 of the Copyright Act.

MOTION FOR DEFAULT JUDGMENT

I. SUMMARY OF RELEVANT FACTS

Plaintiffs are recording companies that brought suit against Defendant pursuant to the Copyright Act of 1976, 17 U.S.C. Section 101, *et seq.* (“Copyright Act”), for the infringement of, among others, Plaintiffs’ nine copyrighted sound recordings. Declaration of Matthew Franklin Jaksa (“Jaksa Decl.”), Exh. 1 (Complaint, ¶¶ 16-17 and Exh. A). Among the rights granted to each Plaintiff under the Copyright Act are the exclusive rights to reproduce their respective copyrighted sound recordings (“Copyrighted Recordings”) and to distribute them to the public. Jaksa Decl., Exh. 1 (Complaint, ¶ 13). As of May 28, 2007, Defendant had used, and continued to use, an online media distribution system to download Plaintiffs’ Copyrighted Recordings and/or distribute the Copyrighted Recordings to the public. Jaksa Decl., Exh. 1 (Complaint, ¶ 16). In doing so, Defendant has infringed upon Plaintiffs’ copyrights and has violated Plaintiffs’ exclusive rights of reproduction and distribution. *Id.*

The Summons and Complaint were served on Defendant on February 18, 2008, by substitute service. Jaksa Decl., ¶ 10. Defendant has failed to answer or otherwise appear in this action. Jaksa

1 Decl., ¶ 11. As a result, the Clerk of the Court entered Defendant's default on March 27, 2008, and
 2 Defendant was notified thereof on March 27, 2008. Jaksa Decl., ¶¶ 13-14, Exhs. 3 and 4. Plaintiffs
 3 are informed and believe that Defendant is not a minor, and is neither incompetent nor in active
 4 military service. Jaksa Decl., ¶¶ 15-16, Exhs. 5 and 6.

5 By this application, Plaintiffs respectfully request that the Court enter default judgment
 6 against Defendant for: (1) the minimum statutory damages for each of the nine (9) infringements
 7 alleged in the Complaint in the amount of \$6,750.00, (2) a permanent injunction pursuant to Section
 8 502 of the Copyright Act, and (3) costs in the amount of \$420.00 pursuant to Section 505 of the
 9 Copyright Act.

10 **II. ARGUMENT**

11 **A. Legal Standard**

12 For purposes of a default judgment, the well-pled allegations of the complaint are taken as
 13 true. *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 918 (9th Cir. 1987). If the court determines
 14 that a defendant is in default, the defendant's liability is collectively established and the factual
 15 allegations in the complaint, except those relating to damages, are accepted as true. *Geddes v.*
 16 *United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977). The power to grant or deny relief upon an
 17 application for default judgment is within the discretion of the Court. *Aldabe v. Aldabe*, 616 F.2d
 18 1089, 1092 (9th Cir. 1980).

19 **B. Default Judgment Against Defendant Is Warranted And Appropriate**

20 When determining whether to grant default judgment, courts are instructed to consider the
 21 following factors: (1) the substantive merit of the plaintiff's claims, (2) the sufficiency of the
 22 complaint, (3) the amount of money at stake, (4) the possibility of prejudice to the plaintiff if relief is
 23 denied, (5) the possibility of disputes to any material facts in the case, (6) whether default resulted
 24 from excusable neglect, and (7) the public policy favoring resolution of cases on the merits. *Eitel v.*
 25 *McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986); *accord PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F.
 26 Supp. 2d 1172, 1174 (C.D.Cal. 2002); *Discovery Communications, Inc. v. Animal Planet, Inc.*, 172
 27 F. Supp. 2d 1282, 1287 (C.D.Cal. 2001); *PepsiCo v. Triunfo-Mex, Inc.*, 189 F.R.D. 431, 432
 28 (C.D.Cal. 1999). "In applying this discretionary standard, default judgments are more often granted

1 than denied.” *Triunfo-Mex, Inc.*, 189 F.R.D. at 432. As set forth below, each of the factors weighs
 2 in favor of granting default judgment, and, thus, Plaintiffs’ application should be granted.

3 **1. PLAINTIFFS HAVE STATED A SUFFICIENT CLAIM FOR RELIEF**

4 The first two factors, which consider the substantive merit of the plaintiff’s claims and the
 5 sufficiency of the complaint, essentially require that the allegations in Plaintiffs’ Complaint state
 6 sufficient claims for relief. *Cal. Sec. Cans*, 238 F. Supp. 2d at 1175; *Discovery Communications,*
 7 *Inc.*, 172 F. Supp. 2d at 1288.

8 To prevail on their claim for copyright infringement under the Copyright Act, Plaintiffs must
 9 prove that Defendant violated an exclusive right of the copyright owner as provided by Section 106
 10 of the Copyright Act, which provides, in pertinent part:

11 [T]he owner of copyright under this title has the exclusive rights to do
 12 and to authorize any of the following: (1) to reproduce the copyrighted
 13 work in copies or phonorecords; . . . (3) to distribute copies or
 14 phonorecords of the copyrighted work to the public by sale or other
 15 transfer or ownership, or by rental, lease, or lending.

16 17 U.S.C. § 106. In other words, Section 106 provides the copyright owner with the exclusive right
 17 to copy or distribute copyrighted work to the public. Such work includes sound recordings. 17
 18 U.S.C. § 102(a)(7).

19 Furthermore, Section 501 of the Copyright Act provides, in pertinent part, that “anyone who
 20 violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122
 21 [of the Copyright Act] . . . is an infringer of the copyright or right of the author, as the case may be,”
 22 and that the “legal or beneficial owner of an exclusive right under a copyright is entitled . . . to
 23 institute an action for any infringement of that particular right committed while he or she is the
 24 owner of it.” 17 U.S.C. § 501(a)-(b).

25 Here, the Complaint alleges that Plaintiffs are the copyright owners or licensees of exclusive
 26 rights under copyright law to the Copyrighted Recordings; as of May 28, 2007, Defendant, without
 27 the permission of Plaintiffs, had used, and continued to use, an online media distribution system to
 28 download the Copyrighted Recordings and/or distribute the Copyrighted Recordings to the public;

1 and the acts of infringement have been willful and intentional in disregard of and indifferent to the
 2 rights of Plaintiffs.¹ Jaksa Decl., Exh. 1 (Complaint, ¶¶ 12-19). As such, Plaintiffs have sufficiently
 3 pled the elements necessary to state a copyright infringement claim against Defendant. *See*
 4 *TeleVideo*, 826 F.2d at 917-18.

5 **2. THE MONETARY JUDGMENT REQUESTED BY PLAINTIFFS IS REASONABLE**

6 The third factor – the amount of money at stake – also weighs in Plaintiffs’ favor. Here,
 7 Plaintiffs are requesting the minimum statutory damages for copyright infringement pursuant to
 8 Section 504 of the Copyright Act in the amount of \$6,750.00, and costs pursuant to Section 505 of
 9 the Copyright Act in the amount of \$420.00. Jaksa Decl., ¶ 17.

10 **a. Plaintiffs’ Request for Statutory Damages Is Reasonable**

11 Section 504 of the Copyright Act provides that a copyright infringer is liable for statutory
 12 damages, and that the copyright owner may elect to recover an award of statutory damages for all
 13 infringements involved in the action in a sum of not less than \$750 or more than \$30,000, as the
 14 Court considers just. 17 U.S.C. § 504(a), (c); *Los Angeles News Serv. v. Reuters Television Int’l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998), *cert. denied* 525 U.S. 1141, 119 S. Ct. 1032 (1999) (“a
 15 plaintiff may recover statutory damages whether or not there is adequate evidence of the actual
 16 damages suffered by plaintiff or of the profits reaped by defendant, in order to sanction and vindicate
 17 the statutory policy of discouraging infringement”). “Statutory damages are particularly appropriate
 18 in a case, such as this one, in which defendant has failed to mount any defense or to participate in
 19 discovery, thereby increasing the difficulty of ascertaining plaintiff’s actual damages.” *Jackson v. Sturkie*, 255 F. Supp. 2d 1096, 1101 (N.D.Cal. 2003). Courts routinely award minimum statutory
 20 damages (or higher) as part of default judgments in copyright infringement cases. *See Jackson*, 255
 21 F. Supp. 2d at 1103; (granting an award higher than the statutory minimum pursuant to a motion for
 22
 23

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¹ As set forth above, the allegations of Plaintiffs’ complaint are deemed true because a
 26 default has been entered against Defendant in this case. *See TeleVideo Sys., Inc*, 826 F.2d at 917-18
 27 (“upon default the factual allegations of the complaint . . . will be taken as true.”); *Discovery
 28 Communications, Inc.*, 172 F.Supp. 2d at 1288 (“for purposes of a default judgment, the well-plead allegations of the complaint are taken as true.”).

1 default judgment); *Microsoft Corp. v. Wen*, 2001 WL 1456654, No. C 99-04561 MEJ, *5-6 (N.D.
 2 Cal. Nov. 13, 2001) (awarding \$15,000 in statutory damages for each of six infringements); *Perfect
 3 10, Inc., v. Talisman Comm. Inc.*, 2000 WL 364813, No. CV99-10450 RAP MCx, *3-4 (C.D. Cal.
 4 Mar. 27, 2000) (awarding maximum amount of statutory damages for willful infringement on default
 5 judgment); *see also Ortiz-Gonzalez v. Fonovisa*, 277 F.3d 59, 63-64 (1st Cir. 2002) (granting an
 6 award of greater than minimum statutory damages as part of default judgment); *D.C. Comics Inc. v.
 7 Mini Gift Shop*, 912 F.2d 29, 35, 37 (2d Cir. 1990) (awarding greater than the minimum statutory
 8 damages award as part of default judgment); *Morley Music Co. v. Dick Stacey's Plaza Motel, Inc.*,
 9 725 F.2d 1, 2-3 (1st Cir. 1983) (granting an award of greater than minimum statutory damages as
 10 part of default judgment); *Getaped.com, Inc. v Cangemi*, 188 F. Supp. 2d 398, 400-402 (S.D.N.Y.
 11 2002) (awarding \$30,000 statutory damages for single infringement).

12 Here, Plaintiffs are seeking only the minimum statutory damages. Accordingly, Plaintiffs'
 13 request for statutory damages is reasonable and appropriate in this case.

14 **b. Plaintiffs Are Reasonable In Seeking Their Costs**

15 Section 505 of the Copyright Act allows the Court, in its discretion, to award Plaintiffs the
 16 recovery of full costs.² 17 U.S.C. § 505. Here, Plaintiffs are requesting their costs expended for
 17 filing this lawsuit and for service of process, which is reasonable. *Jackson*, 255 F. Supp. 2d at 1103
 18 (awarding costs, among other things, to the plaintiff pursuant to its motion for default judgment).
 19 Jaksa Decl., ¶ 17.

20 **3. PLAINTIFFS WILL BE PREJUDICED IF RELIEF IS DENIED**

21 Another factor that the Court may consider when deciding whether to grant default judgment
 22 is whether there is a significant possibility of prejudice to the plaintiffs if default judgment is not
 23 entered. This factor also weighs in Plaintiffs' favor because if default judgment is not entered,
 24 Plaintiffs would be denied the right to judicial resolution of their claims, and would be without other
 25 recourse for recovery. *See Cal. Sec. Cans*, 238 F. Supp. 2d at 1177. Indeed, if default judgment is
 26

27

 28 ² Section 505 also allows a plaintiff to recover its attorneys' fees, but Plaintiffs are not seeking attorneys' fees herein.

1 denied, Defendant's conduct will remain unchecked and Defendant will be free to pursue similar
 2 activities in the future. Thus, this factor also favors the entry of default judgment in this case.

3 **4. THERE IS NO POSSIBILITY OF ANY DISPUTES CONCERNING MATERIAL**

4 **FACTS**

5 The fifth factor considers the possibility of dispute as to any material facts in this case. As
 6 set forth above, Plaintiffs filed a well-pleaded Complaint alleging the elements necessary to prevail
 7 on a cause of action for copyright infringement. Upon entry of default, all factual allegations set
 8 forth in the complaint, except those relating to damages, are deemed true. *Televideo Systems, Inc.*,
 9 826 F.2d at 917-18. Because the clerk of the court entered default against Defendant on March 27,
 10 2008, and the allegations of the Complaint are therefore taken as true, no genuine dispute as to any
 11 material facts exists. *See Cal. Sec. Cans*, 238 F. Supp. 2d at 1177.

12 **5. DEFAULT DID NOT RESULT FROM EXCUSABLE NEGLECT**

13 Default did not result from excusable neglect on the part of Defendant. Indeed, Plaintiffs
 14 have made every effort to notify Defendant of the complaint against her and of Plaintiffs' intent to
 15 pursue a default judgment. Defendant was properly served with the Summons and Complaint by
 16 substitute service on February 18, 2008. Jaksa Decl. ¶ 10. Defendant failed to answer or otherwise
 17 respond to the Complaint. Jaksa Decl. ¶ 11. On March 17, 2008, Plaintiffs sent a letter to Defendant
 18 informing her that she is in default, and urging her to either file and serve a response to the
 19 Complaint or to contact Plaintiffs' representatives to attempt to settle the case. Jaksa Decl. ¶ 12,
 20 Exh. 2. Defendant failed to respond to Plaintiffs' letter and, thus, a default was entered against
 21 Defendant on March 27, 2008. Jaksa Decl. ¶¶ 12-13, Exh. 3. Defendant was notified that the clerk
 22 entered a default against her on March 27, 2008, Jaksa Decl., ¶ 14, Exh. 4, but has nonetheless failed
 23 to appear or defend herself in this action. Jaksa Decl., ¶ 11. Thus, this factor weighs in favor of
 24 default judgment.

25 **6. PUBLIC POLICY WARRANTS THE ENTRY OF A DEFAULT JUDGMENT**

26 Although public policy favors the resolution of a case on its merits, "this preference, standing
 27 alone, is not dispositive." *See PepsiCo., Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d at 1177.
 28 Defendant's failure to answer Plaintiffs' complaint makes a decision on the merits impractical, if not

1 impossible. Under Rule 55(a) of the Federal Rules of Civil Procedure, termination of a case before
 2 hearing the merits is allowed whenever a defendant fails to defend an action. Fed. R. Civ. P. 55(a).
 3 Thus, “the preference to decide cases on the merits does not preclude a court from granting default
 4 judgment.” *Cal. Sec. Cans*, 238 F. Supp. 2d at 1177. Because Defendant failed to respond to or
 5 defend this action in any way, this factor should not preclude the Court from entering a default
 6 judgment against Defendant.

7 For all of the foregoing reasons, each of the *Eitel* factors favors the entry of default judgment
 8 against Defendant in this case. Plaintiffs, therefore, respectfully request that the Court grant default
 9 judgment against Defendant, and grant the monetary damages and permanent injunction set forth
 10 below.

11 **III. PLAINTIFFS ARE ENTITLED TO A PERMANENT INJUNCTION, STATUTORY**
 12 **DAMAGES AND COSTS**

13 Under Federal Rules of Civil Procedure, Rule 54(c), only the amount prayed for in the
 14 complaint may be awarded to the plaintiff in default. Rule 8(a)(3) of the Federal Rules of Civil
 15 Procedure also mandates that Plaintiffs’ demand for relief be specific. As set forth below, Plaintiffs
 16 are entitled to a permanent injunction, statutory damages in the amount of \$6,750.00, and costs in the
 17 amount of \$420.00.

18 **A. Plaintiffs Are Entitled to Statutory Damages**

19 Section 504(a) of the Copyright Act provides that “an infringer of copyright is liable for
 20 either (1) the copyright owner’s actual damages and any additional profits of the infringer . . . or (2)
 21 statutory damages, as provided by subsection (c).” 17 U.S.C. § 504(a). As set forth above,
 22 subsection (c) provides, in pertinent part:

23 ///

24 ///

25 ///

1 the copyright owner may elect, at any time before final judgment is
 2 rendered to recover, instead of actual damages and profits, an award of
 3 statutory damages for all infringements involved in the action, with
 4 respect to any one work, for which any one infringer is liable
 5 individually . . . in a sum of not less than \$750 or more than \$30,000 as
 6 the Court considers just.

7 17 U.S.C. § 504(c). Thus, for each violation of the copyright laws, the Court has discretion to award
 8 statutory damages in an amount not less than \$750 or more than \$30,000.

9 Plaintiffs need not prove actual damages to be entitled to an award of statutory damages
 10 under Section 504. Indeed, “[a] plaintiff may elect statutory damages regardless of the adequacy of
 11 the evidence offered as to his actual damages and the amount of defendant’s profits.” *Columbia*
 12 *Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1194 (9th Cir.
 13 1997), *cert. denied* 534 U.S. 1127, 112 S. Ct. 1063 (2002) (citation omitted); *accord Los Angeles*
 14 *News Serv.*, 149 F.3d at 996 (“a plaintiff may recover statutory damages whether or not there is
 15 adequate evidence of the actual damages suffered by plaintiff or of the profits reaped by defendant,
 16 in order to sanction and vindicate the statutory policy of discouraging infringement”).

17 Furthermore, as set forth in Section II.B.2.a., above, courts routinely grant an award of
 18 statutory damages (or higher) as part of default judgments in copyright infringement cases. As such,
 19 Plaintiffs respectfully request that the Court grant the minimum statutory damages of \$750 for each
 20 of the nine (9) infringements alleged in the Complaint, for a total amount of \$6,750.00.

21 **B. Plaintiffs Are Entitled To A Permanent Injunction**

22 Plaintiffs request that the Court issue the following injunction to enjoin Defendant’s
 23 wrongful conduct:

24 Defendant shall be and hereby is enjoined from directly or indirectly
 25 infringing Plaintiffs’ rights under federal or state law in the
 26 Copyrighted Recordings and any sound recording, whether now in
 27 existence or later created, that is owned or controlled by Plaintiffs (or
 28 any parent, subsidiary, or affiliate record label of Plaintiffs)

1 (“Plaintiffs’ Recordings”), including without limitation by using the
 2 Internet or any online media distribution system to reproduce (i.e.,
 3 download) any of Plaintiffs’ Recordings, to distribute (i.e., upload) any
 4 of Plaintiffs’ Recordings, or to make any of Plaintiffs’ Recordings
 5 available for distribution to the public, except pursuant to a lawful
 6 license or with the express authority of Plaintiffs. Defendant also shall
 7 destroy all copies of Plaintiffs’ Recordings that Defendant has
 8 downloaded onto any computer hard drive or server without Plaintiffs’
 9 authorization and shall destroy all copies of those downloaded
 10 recordings transferred onto any physical medium or device in
 11 Defendant’s possession, custody, or control.

12 Jaksa Decl., Exh. 1 (Complaint, p. 4). As set forth below, Plaintiffs will be irreparably harmed if a
 13 permanent injunction is not issued to prevent Defendant’s reproduction and distribution of Plaintiffs’
 14 copyrighted works. Furthermore, an injunction in this case will further the public’s interest in
 15 upholding copyright protections.

16 **1. PLAINTIFFS WILL BE IRREPARABLY HARMED IF A PERMANENT INJUNCTION**
 17 **IS NOT ISSUED TO ENJOIN DEFENDANT’S WRONGFUL CONDUCT**

18 Section 502 of the Copyright Act vests the Court with the power to grant injunctive relief:
 19 “Any court having jurisdiction of a civil action arising under this title may, subject to the provisions
 20 of section 1498 of title 28, grant . . . final injunctions on such terms as it may deem reasonable to
 21 prevent or restrain infringement of a copyright.” 17 U.S.C. § 502(a). A party seeking a preliminary
 22 injunction must show either a likelihood of success on the merits and the possibility of irreparable
 23 injury. *Johnson Controls, Inc. v. Phoenix Control Systems, Inc.*, 886 F.2d 1173, 1174 (9th Cir.
 24 1989). In copyright cases, irreparable harm is presumed on a showing of a reasonable likelihood of
 25 success on the merits, and, thus, “a showing of copyright infringement liability and the threat of
 26 future violations is sufficient to warrant a permanent injunction.” *Sega Enterprises Ltd. v. Maphia*,
 27 948 F. Supp. 923, 940 (N.D.Cal. 1996); *see Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1109 (9th
 28 Cir. 1998); *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 520 (9th Cir. 1993); *A&M*

1 *Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 925 (N.D. Cal. 2001). Where a default has been
 2 entered against a defendant, the plaintiff need not show irreparable harm because the default itself
 3 satisfies the element of success on the merits. *Sony Music Entm't, Inc. v. Global Arts Prod.*, 45 F.
 4 Supp. 2d 1345 (S.D.Fla. 1999) (“The only difference in the elements needed for the granting of a
 5 permanent, as opposed to a preliminary, injunction is the need to show success on the merits, not
 6 merely likelihood of success... Plaintiffs in this case need not show irreparable harm, as the default
 7 against Defendants satisfies the element of success on the merits.”).

8 Here, Defendant’s conduct is causing irreparable injury to Plaintiffs that cannot fully be
 9 compensated or measured by money. Indeed, Defendant’s infringements were widespread, going
 10 well beyond the few representative examples listed in Exhibit A to the Complaint. See Jaksa Decl.,
 11 Exh. 1 (Complaint, ¶ 16 & Exh. A) (noting that Defendant was distributing 1022 total audio files at
 12 the time of identification). Moreover, Defendant’s means of infringement – an online media
 13 distribution system with tens of millions of potential users – has left Plaintiffs’ sound recordings
 14 vulnerable to massive, repeated, near-instantaneous, and worldwide infringement. Because
 15 recordings made available over these systems are typically made available for further unlawful
 16 distribution by the users who download them, Defendant’s conduct has subjected Plaintiffs’ valuable
 17 recordings to ongoing “viral” infringement. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004,
 18 1011, 1013-14 (9th Cir. 2001); *In re Aimster Copyright Litigation*, 334 F.3d 643, 646-47 (7th Cir.
 19 2003); *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 331-332 (S.D.N.Y. 2000), *aff’d*,
 20 273 F.3d 429 (2d Cir. 2001) (when digital works are distributed via the Internet, “[e]very recipient is
 21 capable not only of . . . perfectly copying plaintiffs’ copyrighted [works] They likewise are
 22 capable of transmitting perfect copies of the [works]. The process potentially is exponential rather
 23 than linear”; this means of transmission “threatens to produce virtually unstoppable infringement of
 24 copyright.”).

25 Furthermore, there is no evidence that Defendant has stopped infringing Plaintiffs’
 26 recordings or that, absent an injunction, Defendant would stop. Indeed, Defendant’s failure to
 27 respond to the Complaint offers no assurance that Defendant’s infringing activity has ceased, and
 28 only highlights that Defendant does not take seriously the illegality of her conduct. See *Jackson v.*

1 *Sturkie*, 255 F. Supp. 2d at 1103 (granting permanent injunction in a copyright infringement action
 2 as part of a default judgment because “defendant’s lack of participation in this litigation has given
 3 the court no assurance that defendant’s infringing activity will cease.”); *Cal. Sec. Cans*, 238 F. Supp.
 4 2d at 1178 (granting permanent injunction as part of a default judgment because, among other
 5 things, “in the absence of opposition by the non-appearing defendant, it cannot be said that it is
 6 ‘absolutely clear’ that Defendant’s allegedly wrongful behavior has ceased and will not begin
 7 again.”). Thus, without an injunction, Plaintiffs’ copyrighted recordings would remain vulnerable to
 8 continued and repeated infringement.

9 2. **A PERMANENT INJUNCTION WILL PROTECT THE PUBLIC’S INTEREST IN**
 10 **UPHOLDING COPYRIGHT PROTECTIONS**

11 Courts routinely issue injunctions as part of default judgments. *See Jackson v. Sturkie*, 255
 12 F. Supp. 2d at 1103 (granting permanent injunction in a copyright infringement action as part of a
 13 default judgment because “defendant’s lack of participation in this litigation has given the court no
 14 assurance that defendant’s infringing activity will cease.”); *Cal. Sec. Cans*, 238 F. Supp. 2d at 1177-
 15 78 (granting a permanent injunction as a part of a default judgment); *Discovery Comm., Inc.*, 172 F.
 16 Supp. 2d 1282 (same); *Triunfo-Mex, Inc.*, 189 F.R.D. 431 (same).³ Injunctions are issued pursuant
 17 to Section 502 in order to protect the public’s interest in upholding copyright protections. *See*
 18 *Autoskill Inc. v. National Educ. Support Sys., Inc.*, 994 F.2d 1476, 1499 (10th Cir. 1993), *cert.*
 19 *denied*, 510 U.S. 916, 114 S. Ct. 307 (1993); *Sony Music Entm’t, Inc. v. Global Arts Prod.*, 45 F.
 20 Supp. 2d 1345, 1347-48 (S.D.Fla. 1999). Indeed, “it is virtually axiomatic that the public interest
 21 can only be served by upholding copyright protections and, correspondingly, preventing the

22

23 ³ *See also Claremont Flock Corp. v. Alm*, 281 F.3d 297 (1st Cir. 2002) (affirming award of
 24 default judgment and injunction); *Johnson v. Kakvand*, 192 F.3d 656, 663 (7th Cir. 1999) (affirming
 25 default judgment with injunction); *Securities & Exch. Comm’n v. McNulty*, 137 F.3d 732, 741 (2d
 26 Cir. 1998), *cert. denied*, 525 U.S. 931, 119 S. Ct. 340 (1998) (affirming default judgment enjoining
 27 corporate officer from violating securities laws); *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979
 28 F.2d 60, 64 (5th Cir. 1992) (affirming default judgment for injunction requiring defendant in
 trademark infringement suit to label its product to avoid public confusion); *Sony Music Entm’t, Inc.*
v. Global Arts Prod., 45 F.Supp. 2d 1345, 1347-48 (S.D.Fla. 1999) (entering permanent injunction
 against copyright infringer on default judgment).

1 misappropriation of the skills, creative energies, and resources which are invested in the protected
 2 work.” *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983).
 3 Here, an “injunction is necessary to preserve the integrity of the copyright laws which seek to
 4 encourage individual efforts and creativity by granting valuable enforceable rights.” *Atari Inc. v.*
 5 *North Am. Philips Consumer Elec. Corp.*, 672 F.2d 607, 620 (7th Cir. 1982), *cert. denied*, 459 U.S.
 6 880, 103 S. Ct. 176 (1982) (preliminary injunction).

7 3. THE REQUESTED INJUNCTION IS SPECIFIC IN NATURE AND REASONABLY
 8 SEEKS TO PROTECT ALL OF PLAINTIFFS’ EXISTING AND FUTURE
 9 COPYRIGHTS

10 The injunction requested by Plaintiffs seeks not only to prohibit the future infringement of
 11 Plaintiffs’ existing works, but also protects Plaintiffs’ future copyrights. Plaintiffs continually create
 12 new copyrighted works that would potentially be vulnerable to infringement if the injunction were
 13 limited to existing works. Thus, the requested injunction properly seeks to prevent the reproduction
 14 and distribution of Plaintiffs’ existing *and* future works. *See, e.g., Princeton Univ. Press v.*
 15 *Michigan Document Serv., Inc.*, 99 F.3d 1381, 1392-93 (6th Cir. 1996), *cert. denied*, 520 U.S. 1156,
 16 117 S. Ct. 1336 (1997) (“The weight of authority supports the extension of injunctive relief to future
 17 works.”); *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994) (permanent
 18 injunction includes works created in the future); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F.
 19 Supp. 1522, 1542 (S.D. N.Y. 1991) (enjoining infringement of present and future copyrighted
 20 works); *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672, 686 (S.D. N.Y. 1979) (“[I]t is
 21 well within [the Court’s] equitable power to enjoin infringement of future registered works.”).

22 Furthermore, the injunction sought properly serves to prohibit Defendant from infringing any
 23 and all of Plaintiffs’ copyrighted works. *See Sony Music Entm’t, Inc.*, 45 F. Supp. 2d at 1347-48
 24 (enjoining defendants from infringing any of the copyrighted works owned by Plaintiff, including,
 25 but not limited to, those listed in the complaint); *Canopy Music, Inc. v. Harbor Cities Broad. Inc.*,
 26 950 F. Supp. 913, 916 (E.D. Wis. 1997) (enjoining radio station that infringed 10 musical
 27 composition copyrights “from performing **any songs to which ASCAP possesses the right to**
 28 **license**”) (emphasis added); *Picker Int’l Corp. v. Imaging Equip. Serv., Inc.*, 931 F. Supp. 18, 45 (D.

1 Mass. 1995), *aff'd*, 94 F.3d 640 (1st Cir. 1996) (injunction entered which applies "not only to the
 2 works as to which infringement has already been adjudicated, but also to any other works presently
 3 owned by plaintiff"); *Jobette Music Co., Inc. v. Hampton*, 864 F. Supp. 7, 9 (S.D. Miss. 1994)
 4 (enjoining defendants from performing any musical compositions licensed through ASCAP, not just
 5 those listed in complaint); *Zeon Music v. Stars Inn Lounge, Ltd.*, 1994 WL 163636, No. 92 C 7607,
 6 at *5 (N.D. Ill. Apr. 28, 1994) (where defendants infringed four songs, court enjoined them "from
 7 publicly performing or sponsoring the public performances of **any musical composition included in**
 8 **ASCAP's repertory** until such time as defendants obtain a license to do so") (emphasis added);
 9 *Weintraub/Okun Music v. Atlantic Fish & Chips, Inc.*, 1991 WL 34713, No. 90 C 4938, at *4 (N.D.
 10 Ill. Mar. 13, 1991) (seven songs infringed by restaurant; Court enjoined "further infringement of the
 11 copyrights held by ASCAP members").

12 In light of the scope and nature of Defendant's infringement, the need to protect Plaintiffs'
 13 copyrighted works, and the public interest in upholding copyright protection, the requested
 14 injunction is specific in nature, and will serve to prohibit the infringement of all copyrighted sound
 15 recordings owned by Plaintiffs.

16 **C. Plaintiffs Are Entitled To Their Costs**

17 Under Section 505 of the Copyright Act, courts have the discretion to award "the recovery of
 18 full costs" and reasonable attorneys' fees. 17 U.S.C. § 505; *Discovery Communications, Inc.*, 172 F.
 19 Supp. 2d at 1292 (granting default judgment including an award of costs based on affidavit
 20 specifying costs submitted with application for default judgment); *see also Century ML-Cable Corp.*
 21 *v. Diaz*, 39 F. Supp. 2d 121, 126 (D.P.R. 1999) (same); *Cablevision Sys. N.Y. City Corp. v. Lokshin*,
 22 980 F. Supp. 107, 115 (E.D.N.Y. 1997) (same); *Cross Keys Publ'g Co., Inc. v. Wee, Inc.*, 921 F.
 23 Supp. 479, 481-82 (W.D. Mich. 1995) (copyright infringement action; same); *Jobette Music Co.,*
 24 *Inc.*, 864 F. Supp. at 10 (same). Indeed, an award of costs would "(1) deter future copyright
 25 infringement; (2) ensure that all holders of copyrights which have been infringed will have equal
 26 access to the court to protect their works; and (3) penalize the losing party and compensate the
 27 prevailing party." *A&N Music Corp. v. Venezia*, 733 F. Supp. 955, 959 (E.D. Penn. 1990).

1 Here, Plaintiffs are not seeking attorneys' fees but rather, the costs they incurred in bringing
 2 suit, or \$420.00, which includes \$350.00 in filing fees and \$70.00 expended for service of process.
 3 *See id.*; *Cross Keys Publ'g Co., Inc.*, 921 F. Supp. at 481-82 (default judgment awarding costs).
 4 Jaksa Decl., ¶ 17. Such amount is reasonable, and will serve to deter future infringement and ensure
 5 that all copyright holders will have equal access to the court to protect their works. *See A&N Music*
 6 *Corp.* 733 F. Supp. at 959 (awarding costs on default judgment in copyright infringement action);
 7 *see also Cross Keys Publ'g Co., Inc. v. Wee, Inc.*, 921 F. Supp. 479, 481-82 (W.D.Mich. 1995)
 8 (default judgment awarding costs).

9 **IV. AN EVIDENTIARY HEARING IS NOT NECESSARY HERE BECAUSE THE**
 10 **DAMAGES PLAINTIFFS SEEK ARE EASILY ASCERTAINABLE**

11 When ruling on an application for default judgment, the Court has discretion in determining
 12 whether an evidentiary hearing is necessary or whether to rely on detailed affidavits or documentary
 13 evidence. Fed. R. Civ. P. 55(b)(2). It is well settled, however, that a default judgment for money
 14 may be entered without an evidentiary hearing if the amount claimed is a liquidated sum or capable
 15 of mathematical calculation. *Davis v. Fendler*, 650 F.2d 1154, 1161-62 (9th Cir. 1981) (affirming
 16 default judgment entered without evidentiary hearing where damages sought were a definite sum).
 17 As set forth above, Plaintiffs are seeking only the minimum statutory damages, costs and a
 18 permanent injunction. Because those damages are easily ascertainable from the Complaint, no
 19 evidentiary hearing is necessary. *See Davis*, 650 F.2d at 1161-62 (affirming that default judgment
 20 was appropriate even though no evidentiary hearing was held because the damages sought were a
 21 definite sum).⁴

22

⁴ It is settled that a defendant who fails to appear or defend him or herself in an action is not
 23 entitled to notice of an application for entry of default judgment. Fed. R. Civ. P. 55(b)(2); *In re*
 24 *Roxford Foods, Inc.*, 12 F.3d 875, 879 (9th Cir. 1993) ("[N]otice [pursuant to Rule 55(b)(2)] is only
 25 required where the party has made an appearance."); *Wilson v. Moore & Assoc., Inc.*, 564 F.2d 366,
 26 368 (9th Cir. 1977) (affirming trial court's denial of motion to set aside default judgment where
 27 defendant did not give notice of application; "No party in default is entitled to 55(b)(2) notice unless
 28 he has 'appeared' in the action."); *Discovery Comm., Inc. v. Animal Planet, Inc.*, 172 F.Supp. 2d
 1282, 1287-88 (C.D.Cal. 2001). Plaintiffs have nonetheless given notice of this Application to
 Defendant. By providing such notice, however, Plaintiffs do not intend to waive their right to have
 the Court rule on this Application without appearance or objection by Defendant.

1 If, however, the Court decides that a hearing is necessary, Plaintiffs submit that Defendant is
2 not entitled to oppose or present any evidence in opposition to this Application. Schwarzer, W. *et*
3 *al.*, *California Practice Guide, Federal Civil Procedure Before Trial*, 6:42 (2000) (*citing Clifton v.*
4 *Tomb*, 21 F.2d 893, 897 (4th Cir. 1927) (“When a party is in default . . . the party himself has lost his
5 standing in court, cannot appear in any way, cannot adduce evidence, and cannot be heard at the
6 final hearing.”)).

7 **V. CONCLUSION**

8 For all of the foregoing reasons, Plaintiffs respectfully request that the Court enter a default
9 judgment in favor of Plaintiffs and against Defendant, for statutory damages in the total amount of
10 \$6,750.00, an injunction in the form sought in the Complaint, and costs of \$420.00.

11 Dated: June 5, 2008

Respectfully submitted,

12 HOLME ROBERTS & OWEN LLP

13 By: /s/ Matthew Franklin Jaksa
14 MATTHEW FRANKLIN JAKSA
15 Attorney for Plaintiffs

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

3 I am employed in the office of Holme Roberts & Owen in San Francisco, California. I am
4 over the age of eighteen years and not a party to the within action. My business address is 560
5 Mission Street, 25th Floor, San Francisco, CA 94105.

6 On June 5, 2008, I served the foregoing documents described as:

7 **NOTICE OF MOTION AND MOTION FOR DEFAULT JUDGMENT BY THE COURT**

8 **AGAINST DEFENDANT**

9 on the interested party in this action by placing a true and correct copy thereof enclosed in a sealed
10 envelope addressed as follows:

11 **Elise Tamai**
12 **564 Alviso Street**
13 **Santa Clara, CA 95050**

14 BY MAIL: I am "readily familiar" with the firm's practice of collection and
15 processing correspondence for mailing. Under that practice it would be deposited with U.S. postal
16 service on that same day with postage thereon fully prepaid at San Francisco, California in the
17 ordinary course of business. I am aware that on motion of the party served, service is presumed
18 invalid if postal cancellation date or postage meter date is more than one day after date of deposit for
19 mailing in affidavit.

20 (FEDERAL) I declare that I am employed in the office of a member of the bar of this
21 court at whose direction the service was made.

22 Executed on June 5, 2008 at San Francisco, California.

23 
24

25

Della Grant
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